IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1539

STEPHEN K. EASTON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## REPLY BRIEF FOR PETITIONER

ASHER B. LANS
*Attorney for Petitioner*
555 Madison Avenue
New York, New York 10022
(212) 421-0700

ROBERT STEPHAN COHEN
DEBORAH E. LANS
EDGAR J. ROYCE
LANS FEINBERG & COHEN
*Of Counsel*

August 21, 1978

## TABLE OF CONTENTS

TABLE OF AUTHORITIES



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1539

---

STEPHEN K. EASTON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## REPLY BRIEF FOR PETITIONER

---

### Reply Statement of the Case

The Brief for the United States in Opposition ("U.S. Br.") to the petition of Stephen K. Easton ("Easton"), in order to shore up the Second Circuit's ruling of first impression on an issue of critical importance to our criminal jury system, contains inaccurate, material misstatements of fact designed to characterize Easton as the moving force behind the alleged conspiracy. Because of the significance of the legal issues raised—both as to Easton and to the bar in general—these material misstatements must be clarified.

1. The United States contends that Easton agreed to be accountant for Petri's "conglomerate in exchange for a salary plus a substantial amount of the stock in Zavola-Riss" (U.S. Br., p. 4, citation omitted). Easton was, *in fact,* only a part-time employee, receiving a "modest salary" far below that of even Petri's chauffeur (T. 1389, 1565, 1583-7). Numerous Petri employees, including secretaries, were promised stock (*e.g.,* T. 879-80, 996) but there is no evidence Easton ever received the promised securities.

2. The Government's statement that "Easton and Petri had a number of employees sign corporate promissory notes and corporate resolutions as officers of the various corporations" (U.S. Br., p. 5) in furtherance of the scheme ignores the testimony of Petri employees that it was Petri who appointed office personnel to corporate positions and obtained their signatures on promissory notes (T. 777, 871-2, 1206-7, 1320-3), that *Easton lacked authority* to act without Petri's approval (e.g., T. 1325; Easton Petition, pp. 12-13), and that Petri indeed inveigled even Easton into signing certain promissory notes (*e.g.,* T. 120-1).

3. Nor did Easton submit financial statements to Hockridge, of Chemical Bank, as contended (*compare* U.S. Br., p. 6, *with* T. 1208, 3543). The only financial statements Hockridge received, from or ever discussed with Easton, related to companies *not mentioned in the indictment* (T. 3542-5).

4. The charge that Easton prepared the financial statements (U.S. Br., p. 6) is *unsupported* by any record citation and, indeed, is belied by the fact that *Easton was acquitted on all counts of the indictment charging* the preparation of false financial statements, which were determined by



the jury.* The related claim that Easton submitted false financial statements to the Bank of New York concerning Today Store Services is similarly disproven by the *jury's acquittal of Easton on counts 13 and 14 of the indictment,* which charged such misconduct, together with the declaration of a mistrial as to the remaining counts relating to that corporation.**

5. Finally, the government *offered no record support* for the claim that Easton in any way assisted Petri in manipulating loan records (U.S. Br., p. 6).

Again, but this time in an attempt to give credibility to the major defects and improprieties in the jury's deliberation, the government's statements concerning the evidence of jury misconduct are also without basis in the record. It is implied Easton waived his objection to the manner in which the poll was conducted (U.S. Br., p. 7). The trial judge, however, obviously for efficiency purposes, determined during the course of the trial that an objection by one counsel (counsel for the lead defendant requested the poll (U.S. Br., p. 7)) would apply to all defendants. Even prior to submission of the case to the jury, Easton requested the preparation of a verdict sheet listing each defendant separately as to each count, which request was refused

---

* The Circuit Court found to the contrary in its opinion (A. 4). That erroneous statement in the Court's opinion is also made without citation to any supporting material in the record.

** The United States repeats in its submission the testimony of its witness Burke—who had been promised immunity from prosecution—as purported proof of Easton's authorship of some, unidentified financial statements. Burke's hearsay testimony, admitted over objection, was that Hockridge allegedly made a statement to Burke which indicated Hockridge's belief that Easton had authored some financial statements (T. 1040-45). It was plain error to admit the testimony.

(T. 5479).* Indeed, an objection was made to the taking of a partial verdict (*compare* U.S. Br., p. 7 n. 6, *with* T. 5961-2).

## ARGUMENT

### I.

**Because juror revelations of coercion and want of unanimity were made prior to the jury's discharge, Rule 606(b) of the Federal Rules of Evidence is inapplicable and the judgment must be reversed.**

#### A. Rule 606(b) Is Inapplicable.

The government argues that to have received evidence of coercion and want of juror unanimity would have contravened Rule 606(b) of the Federal Rules of Evidence ("F.R.E."). However, because that rule had been interpreted prior to the decision below, exclusion of such evidence would only be warranted if—and after—the jury had been discharged. Never, prior to the Circuit Court's decision in this matter, has the rule been held applicable to bar substantial evidence volunteered prior to jury discharge but after a partial verdict has been taken (*see* Easton Petition, pp. 16-20).

The interest in verdict finality, advacned to justify extension of F.R.E. Rule 606(b) to partial verdicts (U.S. Br., p. 12), is illusory because finality as a goal cannot exist independently of the other values protected by the Rule

* The fact that no request was made for the jurors to be polled as to each defendant cannot be deemed to foreclose this Court's review of the polling procedure, in view of the fundamental character of the error and the Court's earlier refusal to provide a verdict sheet listing each defendant separately. *Johnson* v. *United States*, 318 U.S. 189, 200 (1943).



(Easton Petition, pp. 18-19). Plainly, those other goals—protection of jurors from harassment and discouragement of jury tampering—are unaffected by confinement of F.R.E. Rule 606(b) application to evidence obtained post-discharge as inquiries may be made prior to discharge by the Court. 8 Wigmore, *Evidence* § 2350, at 691 (McNaughton ed. 1961); 6A Moore's *Federal Practice* ¶ 59.08[4], at 59-143 (2d ed. 1974).

Nor will grant of the instant petition and reversal of the judgment render all partial verdicts merely "tentative, working hypotheses" (U.S. Br., p. 12). Rather, such verdicts will be subject to challenge only upon restricted grounds in those instances where jurors volunteer substantial evidence of misconduct which evidence is sufficient to warrant either requiring the jury to re-deliberate, as the District Court instructed Jurors Three and Four at bar (but not the entire jury), or requiring a new trial.

Finally, and in any event, where evidence is offered to prove the verdict was not unanimous, such evidence has repeatedly been held admissible. *Fox* v. *United States*, 417 F.2d 84, 89 (5th Cir. 1969); *cf.*, *Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028 (2d Cir. 1971).

#### B. The Evidence Volunteered by the Jurors Mandates Reversal.

The assertion that the subsequent verdict finding Easton guilty on Count Two of the indictment validates the District Court's finding, expressed as to Hockridge's and Petri's motions only, that the jurors did not surrender their honest convictions of Easton's innocence, ignores completely the following: (1) the coercive effect of the Court's private instruction to Jurors Three and Four, (2) the fact that Jurors Three and Four had been promised an interview with the Court prior to discharge to review

the events surrounding the Count One conviction, and (3) Juror Three's forthright declaration that she had indeed surrendered her honest conviction (T. 5931; Easton Petition, pp. 25-28).

The Circuit Courts have repeatedly held that evidence of lack of unanimity requires reversal (*see* Easton Petition, pp. 21-22). Such evidence was volunteered before the District Court and there is no justification for dismissing the two jurors' own statements in that connection as untrue, as the District Court apparently did.

## II.

**The events surrounding the return of Jurors Three and Four to deliberations created a coercive environment for further deliberations.**

The interview of Jurors Three and Four was inevitably apparent to the jury as a whole; the interview occurred after the Court had reconvened on February 16, 1977 (T. 5920-8). The jury was also aware, of course, that Jurors Three and Four had dissented from the Count One verdict (T. 5928-34). Following the private interview, Jurors Three and Four were sent to resume deliberations and instructed to raise anew their points concerning Count One with the jury (T. 5932-4). The jury as a whole never received corresponding instructions.

Under circumstances, it must be concluded that the jury as a whole felt immune from criticism for its coercive behavior.* It must also have felt the weight of the Court

* This is particularly so since, in the case of the jury's prior misconduct, the Court privately interviewed each juror and cautioned each against further misconduct (T. 688-727).



behind its substantive views, since the court never instructed it to re-deliberate.

Coincidentally, Jurors Three and Four must have also believed their expressed concerns were insubstantial as the Court's comments to the two jurors sought to minimize their concerns. For example, the Court characterized Juror Three's statements as evidencing "an emotional problem" (T. 5931).

The total effect of these events was of like impact to an improperly-given *Allen* charge (see Easton Petition, pp. 26-27). Hence, the Count Two conviction must be reversed.

## III.

**The reception of evidence as to unrelated crimes and hearsay evidence which was never authenticated denied Easton a fair trial.**

### A. Evidence of Easton's Failure to Withhold Taxes Was Without Probative Value.

The government's contention that evidence of Easton's knowledge that taxes were not withheld from salaries paid to Petri corporation employees was some proof of the government's claim that the corporation existed merely on paper (U.S. Br., pp. 16-17) is simply silly. Were the corporations shells or fictions, no salaries would have been paid. Moreover, there are a multitude of reasons why corporations fail to withhold taxes other than an intent to defraud third parties. In short, this inflammatory evidence did not even have "possible worth," let alone "real probative value," on the issue of intent, *Morgan* v. *United States*, 355 F.2d 43, 45 (10th Cir.), *cert. denied*, 384 U.S. 1025 (1966), and its admission mandates reversal.

**B. Admission of the Hearsay and Unauthenticated Financial Statements Upon Which the Jury Obviously and Heavily Relied, Substantially Prejudiced Easton.**

Easton repeatedly objected to the admission of the financial statements on the dual grounds the statements were hearsay and were not authenticated (*compare* T. 740-1, 3365-8, *with* U.S. Br., p. 18).

The government contends the statements were properly authenticated by virtue of evidence that these were statements given Hockridge by Petri and found in the loan file of Chemical Bank (U.S. Br., p. 18). However, the fact that the statements were ultimately found in Chemical Bank's files does not provide proper authentication, as it was conceded the statements were not authored by any Chemical Bank employee and no proof of authorship was made. *U.S.* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 192-94 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

Nor can the concededly hearsay character of the records be overlooked, because the statements were offered for their falsity, not their truth (U.S. Br., p. 18). It is clear that an out of court statement may not be admitted for its substantive content, true or false, or as substantive evidence, absent some exception to the hearsay rule. *See, United States* v. *Plum*, 558 F.2d 568, 572 (10th Cir. 1977); *United States* v. *Tavares*, 512 F.2d 872 (9th Cir. 1975). Thus, in *Culwell* v. *United States*, 194 F.2d 808 (5th Cir. 1952), a prosecution for subornation of perjury, it was held prejudicial error to inquire of a witness whether her prior statements were true *or* false.

As the government concededly offered the financial statements specifically as proof of their substantive content, and



because the jury apparently gave substantial consideration to the documents, as by calling for them during deliberations (T. 5880-3), the admission of the financial statements was prejudicial error.

## CONCLUSION

The petition for a writ of certiorari should be granted and, upon review, the judgment, convicting Easton upon Counts One and Two of the indictment, should be reversed.

Respectfully submitted,

ASHER B. LANS
*Attorney for Petitioner*
555 Madison Avenue
New York, New York 10022
(212) 421-0700

ROBERT STEPHAN COHEN
DEBORAH E. LANS
EDGAR J. ROYCE
LANS FEINBERG & COHEN
*Of Counsel*

August 21, 1978